APR 23 1968
JOHN F. DAVIS, CLERK

No. 1356

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JACK J. GRAY,
Petitioner,

vs.

HOWARD F. JOHNSON, Individually, and As Superintendent of the Osage Indian Agency, Pawhuska, Oklahoma, VIRGIL N. HARRINGTON, Individually, and As Area Director of Bureau of Indian Affairs, Muskogee, Oklahoma, and STUART UDALL, As Secretary of the Interior, and OKLAHOMA LAND & CATTLE COMPANY, an Oklahoma Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FRANK T. McCOY
ROBERT P. KELLY
P. O. Box 329
Pawhuska, Oklahoma 74056
Attorneys for Petitioner

E. L. MERRIHEW, Inc., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

INDEX

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Statutes and Regulations Involved 3
Statement of Facts 4
Reasons for Granting the Writ 7
Argument 8
Conclusion 10
Appendix A—Opinion of Court of Appeals A1
Appendix B—Judgment of the U. S. District Court for the Northern District of Oklahoma A8
Appendix C—Decision of Secretary of Interior A10
Appendix D—Decision of the Area Director A14
Appendix E—Decision of Superintendent of November 3, 1964 ..... A23

Authorities

CASES:

A. B. Small Company v. *American Sugar Refining Co.*, 267 U.S. 233, 69 L. Ed. 589, 45 S. Ct. 295 9
Boesche v. *Udall*, 373 U.S. 472, 10 L. Ed. 2d 491, 83 S. Ct. 1373 ..... 7, 10
Claude C. Connally, et al. v. *General Construction Co.*, 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126 9
Seaton v. *Texas Company*, D.C. Circuit, 256 F.2d 718 7
United States v. *L. Cohen Grocery Co.*, 255 U.S. 81, 65 L. Ed. 516, 41 S. Ct. 298 ..... 8, 9

FEDERAL STATUTES:

34 Stat. 539, Sec. 7 3

FEDERAL REGULATIONS:

25 C.F.R. §2.10 ..... 3, 8

25 C.F.R. §2.14 ..... 2, 4, 6, 7, 8, 10

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JACK J. GRAY,
Petitioner,

vs.

HOWARD F. JOHNSON, Individually, and As Superintendent of the Osage Indian Agency, Pawhuska, Oklahoma, VIRGIL N. HARRINGTON, Individually, and As Area Director of Bureau of Indian Affairs, Muskogee, Oklahoma, and STUART UDALL, As Secretary of the Interior, and OKLAHOMA LAND & CATTLE COMPANY, an Oklahoma Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Jack J. Gray, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on February 8, 1968.

OPINIONS BELOW

The opinion of the Court below has not been officially or unofficially reported, but it is appended hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1968, a petition for rehearing was denied on March 8, 1968. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether, after approval by the Superintendent of the Indian Agency, under delegation of authority from the Secretary of the Interior, of an agricultural lease on restricted Indian lands executed by the Indian owner, and after the expiration of time to appeal the decision approving such lease has expired, the Secretary of Interior can cancel such lease at the request of the Indian owner because the Indian could obtain more rental?

2. Whether, 25 C.F.R., §2.14, promulgated by the Secretary of the Interior, which provides that the decision of the Superintendent, Area Director or Commissioner of Indian Affairs is never final "where it is found by higher authority that failure to appeal on the part of the Indian or Indian Tribe would result in inequity or injustice to the Indian or Indian Tribe," is so indefinite and vague as to be a violation of the due process clauses of the Fifth Amendment of the Constitution.

STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fifth Amendment:

"No person shall be * * * deprived of life, liberty, or property, without due process of law."

34 Stat. 539, Sec. 7:

"That the lands, herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and lease said land for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: Provided, That parents of minor members, of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minor arrive at their majority: And, provided further, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

Title 25, C.F.R., Subpart B, Appeals to the Area Director or to the Commissioner. §2.10 Appeal, how taken; time limit:

(a) "An interested party who wishes to appeal to the Area Director or Commissioner shall initiate his appeal by filing a written petition with the official who made the decision. Such official if requested by an Indian or Indian tribe shall render such assistance as is appropriate in the preparation of any appeal by an Indian or Indian tribe. The petition should give an identification of the case a statement of reasons for the appeal and any arguments the petitioner wishes to make. The petition must be received in such office within 20 days after the date of the mailing of the notice of the

decision complained of to the petitioner unless further time is granted, pursuant to the regulations in this part. The petitioner also may file an additional written statement of reasons and arguments or briefs with the Area Director or the Commissioner within 10 days after the filing of the petition."

Title 25, C.F.R., §2.14, Effect of failure to appeal:

"When any party fails to appeal a decision of the Superintendent, Area Director, or the Commissioner, that decision shall be final as to such party and will not be disturbed except for fraud or gross irregularity, or where it is found by higher authority that the failure to appeal on the part of an Indian or Indian tribe would result in an inequity or injustice to the Indian or Indian tribe."

STATEMENT OF FACTS

William Fletcher, a full blood Osage Indian, owns 400 acres of restricted Osage Indian land in Osage County, Oklahoma. The land is under the direct supervision of the Superintendent of the Osage Indian Agency. In June, 1964, petitioner, Jack J. Gray, learned that the land would be up for lease, and offered to give $1,325.00 cash rental per year and perform all of the soil conservation requirements established by the Osage Indian Agency for a ten year lease. The lease embodying the offer of the petitioner was prepared by the Branch of Realty of the Osage Indian Agency, forwarded to Fletcher in Oklahoma City. About two weeks later Fletcher returned the lease to the Agency duly signed. The Agency then forwarded the lease to Petitioner for signing and petitioner completed the lease and returned it to the Osage Agency for processing for approval on July 9, 1964. On July 20, 1964, the lease of the petitioner was approved by the Superintendent of the Osage Indian Agency, in the following language:

"The within lease is hereby approved and declared to be in accordance with the law and the rules and regulations prescribed by the Secretary of Interior thereunder and now in force."

Three months later in October, 1964, the Oklahoma Land & Cattle Company learned that the lease to petitioner Gray had been approved and sought to purchase the lease from petitioner. The petitioner refused to sell the lease to the Oklahoma Land & Cattle Company, and on October 27, 1964, the Oklahoma Land & Cattle Company obtained another lease signed by Fletcher, providing for a cash rental of $1,500.00, and caused the same to be forwarded to the Osage Indian Agency for approval. On November 3, 1964, the Superintendent of the Osage Indian Agency notified Fletcher that the land was already under an approved lease to Gray and refused to approve the lease to the Oklahoma Land & Cattle Company.

The Oklahoma Land & Cattle Company filed an appeal on November 24, 1964, from the decision of the Superintendent on November 3, 1964, to the respondent Area Director, in the name of Fletcher and itself. On March 18, 1965, the Area Director denied the appeal of William Fletcher and the Oklahoma Land & Cattle Company, finding that the action of the Superintendent of the Osage Indian Agency of November 3, 1964, "should not be superseded and set aside." Nevertheless the Area Director canceled the Gray lease as not in the best interest of the Indian, and directed that the land be offered for lease under sealed bids for a term not to exceed five (5) years.

Gray appealed to the Commissioner of Indian Affairs, who affirmed the decision of the Area Director. This decision was administratively affirmed by the Assistant Secretary of Interior acting for the Secretary.

The administrative remedies having been exhausted, Gray filed a Complaint in the United States District Court for the Northern District of Oklahoma, to judicially review the administrative action. Jurisdiction is vested under Title 28, U.S.C., §1361. After the issues were made up, Petitioner filed a motion for summary judgment. On July 17, 1967, the Court overruled the motion for summary judgment and affirmed the decision of the Secretary of the Interior. Appeal was taken to the United States Court of Appeals for the Tenth Circuit. Among the grounds urged in the Tenth Circuit was the following:

> "3. After the approval of appellant's (petitioner's) lease by the Superintendent and no appeal was taken therefrom within twenty (20) days, as provided by the regulations, the action of the Superintendent became final, and neither the Secretary of Interior, nor any of his subordinate officers had the jurisdiction to summarily rescind the approval of the appellant's (petitioner's) lease, and the action of the Secretary of the Interior deprived the appellant (petitioner) of his property rights without due process of law and in violation of Title 5, U.S.C., Sec. 1008.
>
> "4. The Secretary of the Interior had no authority to hold null and void the Jack Gray lease, and to do so was to deprive appellant (petitioner) of his property rights without due process of law in violation of 5 U.S.C., Sec. 1008."

The cause was submitted before Murrah, Chief Judge, Brackenstein, Circuit Judge, and Delehant, District Judge sitting by designation. With Murrah dissenting, the Tenth Circuit affirmed the decision of the District Court, holding that there was no time limit on appeal by restricted Indians; that they had a continual right of appeal under 25 C.F.R., §2.14, on ground of injustice or inequity.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals held the Indian had a continual right of appeal under the provisions of Title 25, C.F.R., §2.14. This Regulation under the applicable decisions of this Court is invalid for reason of indefiniteness. The question of the validity of this regulation is a matter of extreme importance, affecting some 50,000,000 acres of restricted Indian lands throughout the United States under the trusteeship of the U. S. Department of Interior. (U. S. Department of Interior's *American Department of Natural Resources*, Page 28, 1966). If the Secretary of Interior can overturn the approved contracts of the Indian owners of this 50,000,000 acres of land at any time a third party will offer the Indian more rental, then there is no such thing as a valid binding lease contract, and the rule of law upon which this country was founded will have been replaced by the rule of violence, and of power and of force. The decision of the Court of Appeals ignored the limitation of *Boesche* v. *Udall*, 373 U.S. 473, 10 L. Ed. 2d 491, 83 S. Ct. 1373:

> "We hold *only* that the Secretary has the power to correct administrative errors of the sort involved here by cancelation of leases in *proceedings timely instituted by competing applicants for the same land.*" (Emphasis added)

The Court of Appeals distinguished *Seaton* v. *The Texas Company*, D.C. Circuit, 256 F. 2d 718, and other similar cases upon the ground that:

> "The cases are distinguishable because they relate to no regulation such as 25 C.F.R., Sec. 2.14, which makes approval of the lease subject to a continuing right of appeal in the case of injustice to the Indian."

ARGUMENT

25 C.F.R., Sec. 2.10, limits the time to appeal from a decision of the Department of Interior to 20 days. The Court of Appeals held valid the Indian's appeal taken November 24, 1964, from the approval of the Gray lease on July 20, 1964, over four months later, upon basis of 25 C.F.R., §2.14.

25 C.F.R., §2.14, provides that the Indian can appeal at any time

> "where it is found by higher authority that the failure to appeal on the part of the Indian or Indian tribe would result in an inequity or injustice to the Indian or Indian tribe."

This regulation is clearly void as violating the due process clauses of the Fifth Amendment because of indefiniteness. The application of this regulation giving an indefinite time of appeal, after the limitation of twenty (20) days set by 25 C.F.R., §2.10, depends upon the determination "by higher authority" of what is "injustice" or "inequity." Neither of the terms "injustice" or "inequity" are defined. Both terms are elastic. What is the scope of the term "injustice" or "inequity?" By what standard is "injustice" to be measured? By what standard is "inequity" to be measured?

The language of this court in the case of *United States v. L. Cohen Grocery Company*, 255 U.S. 81, page 89, in discussing the terms "unjust" and "unreasonable" is applicable to the terms "inequity" and "injustice." These terms:

> "* * * leave open the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact we see no reason to doubt the soundness of the observation * * * that to attempt to enforce the section would be the exact equivalent of an effort

> to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust * * * in the estimation of the court."

In the case of *United States* v. *L. Cohen Grocery Company, supra,* this Court held Sec. 4 of the Lever Act void. This section made it unlawful for any person to "make any unjust or unreasonable * * * charge in * * * dealing in or with the necessaries." The terms "unjust" and "unreasonable" were held to have no commonly recognized or accepted meaning, and was so indefinite and vague that no one could know what it was. The same is true of the terms "inequity" and "injustice."

In *A. B. Small Company* v. *American Sugar Refining Company,* 267 U.S. 233, 69 L. Ed. 589, 45 S. Ct. 295, the same section was held void as pertaining to contractual rights because:

> "It was not the criminal penalty that was held invalid, but the execution of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."

Is there any difference between the terms "injustice" and "inequity" and the terms "unjust" and "unreasonable?" Does the term "injustice" and "inequity" have such a fixed and definite meaning as to be clearly understandable by all men of common intelligence? Or, are these terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application? In the regulations before this Court, what is "inequity" or "injustice" is left to the whim of the moment of the "higher authority" and subject his decision to the political pressures of the day. This court in the case of *Claude C. Connally, et al,* v. *General Construction Company,* 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126, page 391 of the U. S. Reporter stated the rule:

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The term "inequity" is not even defined in Black's Law Dictionary, 4th Edition, and the term "injustice" is defined as:

> "The withholding or denial of justice. In law, almost invariably applied to the act, fault or omission of a court, as distinguished from that of an individual."

Should leases on 50,000,000 acres of restricted Indian lands be subject to the declaration that they are void because of the whim of the moment of some higher authority? If this regulation is valid, then there is no such thing as a binding lease contract on any of this land, as the lease contract is never final.

This Court's decision in *Boesche* v. *Udall*, 373 U.S. 472, 10 L. Ed. 2d 491, 83 S. Ct. 1372, holding that the Secretary had the power to correct administrative errors by cancelation of leases, limited that power to *"proceedings timely instituted"* by competing applicants for the same land." (Emphasis added) The recognition by this Court in that case of the power of the Secretary to cancel leases was not an unbridled power, but one to cancel leases only when proceedings were timely instituted. This is a far cry from the continual right of appeal in case of injustices the Court of Appeals found to exist under 25 C.F.R., §2.14.

CONCLUSION

25 C.F.R., §2.14, applies to 50,000,000 acres of Indian lands. Under this Regulation, the Secretary has unlimited power to cancel any lease at any time the Indian comes up with a new lease for payment of more rental money.

Lease contracts are reduced by this regulation to tenancies at will of the Secretary, and the Secretary's authority is so absolute as to be inconsistent with the concept of government under law.

We respectfully urge this court to grant a Writ of Certiorari and review this question of the authority of the Secretary of Interior to cancel Indian leases without timely proceedings and to hold unconstitutional 25 C.F.R., §2.14.

Respectfully submitted,

FRANK T. McCOY
ROBERT P. KELLY
P. O. Box 329
Pawhuska, Oklahoma
Attorneys for Petitioner